Supreme Court, U.S.
FILED
MAY 23 1996
CLERK

(2)

No. 95-1728

In the Supreme Court of the United States

OCTOBER TERM, 1995

JANETTE LOHMAN, THE MISSOURI DEPARTMENT OF REVENUE AND THE STATE OF MISSOURI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID ENGLISH CARMACK
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTION PRESENTED

Whether application of the Missouri sales tax to electricity sold under a contract with the United States for use at a federal ammunition plant located in Missouri violates the constitutional immunity of the United States from state taxation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Alabama v. *King & Boozer*, 314 U.S. 1 (1941)	8, 12
Diamond National Corp. v. *State Bd. of Equalization*, 425 U.S. 268 (1975)	9
Farm & Home Savings Ass'n v. *Spradling*, 538 S.W.2d 313 (Mo. 1976)	10
First Agricultural National Bank v. *State Tax Comm'n*, 392 U.S. 339 (1968)	7, 9, 10
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110 (1954)	12
Mayo v. *United States*, 319 U.S. 441 (1943)	7, 9
United States v. *Benton*:	
729 F. Supp. 671 (W.D. Mo. 1990), aff'd, 975 F.2d 511 (8th Cir. 1992), cert. granted and judgment vacated sub nom. *United States* v. *Lohman*, 21 F.3d 844 (8th Cir. 1994)	6
772 F. Supp. 453 (W.D. Mo. 1990), aff'd, 975 F.2d 511 (8th Cir. 1992), cert. granted and judgment vacated sub nom. *United States* v. *Lohman*, 21 F.3d 844 (8th Cir. 1994)	6
United States v. *District of Columbia*, 669 F.2d 738 (D.C. Cir. 1981)	12
United States v. *Forst*, 442 F. Supp. 920 (W.D. Va. 1977), aff'd, 569 F.2d 811 (4th Cir. 1978)	12
United States v. *Kabeiseman*, 970 F.2d 739 (10th Cir. 1992)	13

Cases—Continued: Page

United States v. *Mississippi Tax Comm'n*, 421 U.S. 599 (1975) 9, 10, 11

United States v. *New Mexico*, 455 U.S. 720 (1982) 7, 8, 9, 12

Constitution and statutes:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 7

Mo. Rev. Stat. (1996):

§ 144.010.1(8) 4, 6, 13

§ 144.020.1 10

§ 144.020.1(3) 4

§ 144.060 ..... 5, 7, 10

§ 144.080.4 ..... 4, 7, 10

§ 144.080.5 ..... 4-5, 7, 10

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1728

JANETTE LOHMAN, THE MISSOURI DEPARTMENT OF REVENUE AND THE STATE OF MISSOURI, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 74 F.3d 863. The opinions of the district court (Pet. App. A14-A15, A17-A24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1996. The petition for a writ of certiorari was filed on April 22, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1951, the United States entered into a contract to purchase electricity from the Kansas City Power & Light Company (KCPL). Under that contract, KCPL agreed to "sell and deliver to the Government" and the United States agreed to "purchase and receive from [KCPL] * * * electrical service" at the federally-owned Lake City Army Ammunition Plant, where small caliber ammunition is manufactured (Pet. App. A2-A3). The contract provides that it "shall continue in effect until terminated at the option of the Government by the giving of not less than 30 days advance written notice of the effective date of termination" (*id.* at A3).

Under the contract, title to the electricity passed directly from KCPL to the United States upon delivery at the plant. KCPL submitted bills for electricity directly to the United States. The bills were paid with checks drawn on the Treasury (Pet. App. A3).

The United States hired the Remington Arms Company to manage the ammunition plant (Pet. App. A3, A20). In 1962, the United States modified its contract with KCPL to provide (*id.* at A3-A4):

> [S]o long as the plant is operated for the Government by a CPFF [cost plus fixed fee] Contractor, currently Remington Arms Company, Inc., orders for service under this contract may be placed with [KCPL] by such CPFF Contractor and will be honored to the same extent as will orders placed by the Government, all in accordance with the terms and conditions of this contract. Furthermore, during such period of time [KCPL] agrees that placing of such orders,

> and payment thereof by such CPFF Contractor, will satisfy the requirements of this contract concerning minimum monthly accounts to be ordered and paid for by the Government.

The Remington Arms Company was not a party to this contract. The United States has never provided KCPL with the written notice required to terminate the contract (*id.* at A3, A4-A5).

Under the contract, as modified, title to the electricity delivered by KCPL to the federally-owned substations at the ammunition plant continued to pass directly from KCPL to the United States (Pet. App. A3, A4; JA 512, 1515, 1531).[1] Under the separate contract between the United States and the plant manager, the manager was required to pay the bills for electrical power delivered by KCPL and was reimbursed for those payments by the United States (Pet. App. A20).

In 1985, Olin Corporation succeeded Remington Arms Company as the plant manager. The contract between Olin and the United States requires Olin to provide "qualified personnel to perform payment procedures" for the government's contract to purchase electricity from KCPL (JA 1249). The payment procedures included validating that the "rate per kilowatt hour (KWH) on invoice is equal to approved rate per KWH provided in current Dept of Army purchase contract for electricity" and making "payment to each utility company for validated amount of invoice" (*ibid.*). Olin informed KCPL in writing that Olin had assumed the administrative function of processing and paying invoices for de-

---

[1] "JA" refers to the joint appendix filed in the court of appeals.

livery of electricity under the government's contract with KCPL. Olin requested KCPL to continue electrical services in accordance with the government's contract with KCPL and advised that Olin would process and pay the invoices for such electrical service (Pet. App. A4; JA 257-261).[2]

2. The State of Missouri imposes a tax upon "the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state" (Mo. Rev. Stat. § 144.020.1 (1996); Pet. App. A7, A21, A27). The sale of electricity is specifically included within the scope of this tax (Mo. Rev. Stat. § 144.020.1(3) (1996); Pet. App. A7 n.7, A22, A27). A sale at retail is defined as "any transfer made by any person engaged in business * * * of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration" (Mo. Rev. Stat. § 144.010.1(8) (1996); Pet. App. A21-A22, A25). The seller "shall collect the tax from the purchaser" (Mo. Rev. Stat. § 144.080.4 (1996); Pet. App. A8, A28). It is a misdemeanor for the seller to "advertise or hold out or state to the public or to any customer directly or indirectly that the tax or any part thereof * * * required to be collected by him, will be assumed or absorbed by the person, or that it will not be separately stated and added to the selling price of the property sold or the service rendered, or if added, that it or any part thereof will be refunded" (Mo. Rev. Stat.

---

[2] The manager of Olin's accounting department testified that Olin did not order any electricity but merely advised KCPL of the change in the contract operators at the government's facility (JA 450, 454, 480-481).

§ 144.080.5 (1996); Pet. App. A9, A28). It is also a misdemeanor for the purchaser to refuse to pay the tax that the seller is required to collect and remit to the State (Mo. Rev. Stat. § 144.060 (1996); Pet. App. A8, A27-A28).

3. In connection with a compliance audit, the Missouri Department of Revenue assessed taxes against KCPL for electricity delivered to the federal ammunition plant for the period from January 1986 to September 1989 (Pet. App. A5-A6, A21). KCPL paid the taxes under protest and commenced state administrative proceedings challenging the assessment.[3] KCPL also commenced an action in state court seeking indemnification from Olin for any sales tax due or, alternatively, a judgment against the State declaring the sales of electrical power under KCPL's contract with the United States to be exempt from the state sales tax (*id.* at A5-A6, A21).

The United States then brought this action in federal district court seeking a declaration either (i) that the electricity sold by KCPL under its contract with the United States was not subject to state taxation or, (ii) in the alternative, that, if the electricity were deemed to have been purchased by Olin, that purchase would be exempt from tax under state law as a purchase for resale to the United States. The complaint also sought an injunction to prohibit assessment and collection of the state tax on these sales of electricity (Pet. App. A2, A6). The state court suit that KCPL had commenced was removed to federal court and consolidated with the action brought by the United States (*id.* at A21).

---

[3] The administrative proceedings were stayed pending disposition of the present case (Pet. App. A15).

4. The district court acknowledged that the contract between KCPL and the United States "makes it more likely the United States, rather than Olin, purchase[d] the electrical power" (Pet. App. A23 n.1). The court also noted that, if the electricity had been purchased by the United States, "the sale of the electrical power would be exempt from a state's sales tax pursuant to the Supremacy Clause" (*ibid.*). The court, however, did not rest its decision on that rationale.

Instead, the court concluded that, if the sales by KCPL had been made to Olin, then Olin purchased the electrical power for resale to the United States, and the sales would therefore be exempt from state tax as sales for resale under applicable state law (Pet. App. A2, A15, A22-A23, citing Mo. Rev. Stat. § 144.010.1(8) (1996)).[4] The court thus concluded that, whether the purchaser was the United States or Olin, these sales of electricity were not properly subject to the state sales tax (Pet. App. A23). The court therefore enjoined petitioners "from assessing, imposing, or collecting Missouri sales tax on sales of electrical power by Kansas City Power & Light Company to the contractor operator of the Plant for the purpose of operating the Plant under its separate contract with the Army" (*id.* at A15).

5. The court of appeals affirmed. The court concluded that, under the contract between the United

---

[4] The district court relied for that conclusion on that court's prior decision in *United States* v. *Benton*, 729 F. Supp. 671 (W.D. Mo. 1990), and 772 F. Supp. 453 (W.D. Mo. 1990), aff'd, 975 F.2d 511 (8th Cir. 1992), cert. granted and judgment vacated sub nom. *United States* v. *Melcher*, 508 U.S. 957 (1993), rev'd on jurisdictional grounds sub nom. *United States* v. *Lohman*, 21 F.3d 844 (8th Cir. 1994).

States and KCPL, sales of electricity were made to the United States, not to its contractor, and that state taxation of those sales is prohibited by the Supremacy Clause of the Constitution (Pet. App. A1-A13).

The court noted that a "State may not, consistent with the Supremacy Clause, * * * lay a tax 'directly upon the United States'" (Pet. App. A6, quoting *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982), quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943)). The court rejected petitioners' claim that the legal incidence of the Missouri sales tax was on the seller (KCPL), rather than on the purchaser, and thus could not be on the United States. The court noted that a "sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (Pet. App. A7, quoting *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347 (1968)). Missouri law requires the tax to be passed on to the purchaser because (i) Mo. Rev. Stat. § 144.080.4 (1996) requires the seller to collect the sales tax from the purchaser, (ii) Mo. Rev. Stat. § 144.060 (1996) makes it a misdemeanor for a purchaser to fail to pay the tax, and (iii) Mo. Rev. Stat. § 144.080.5 (1996) prohibits a seller from "advertis[ing] or hold[ing] out or stat[ing] to the public or to any customer directly or indirectly that the [sales] tax * * * required to be collected by him, will be assumed or absorbed by the [seller,] or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded" (Pet. App. A7-A9).

The court of appeals further explained that, under the contract with KCPL, the purchaser was the

United States (Pet. App. A9-A13). The court noted that the United States alone had contractual liability for the minimum monthly charge under the contract, that Olin did not have a direct contract with KCPL and that pursuant to Olin's contract with the federal government to pay for the electricity, Olin served merely as the federal government's "paymaster" (*id.* at A10).

The court rejected the contention that Olin had a separate contractual relationship with KCPL. The court pointed out that Olin, by correspondence with KCPL, had requested only that KCPL provide electric service to the ammunition plant in accordance with the 1951 contract between the United States and KCPL. The court stated that this correspondence, which the State regarded as a contractual purchase order, "is most properly considered to be an administrative or procedural document" (*id.* at A10 n.9).

The court also rejected petitioners' reliance on *United States* v. *New Mexico*, 455 U.S. 720 (1982), and *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941). The court explained that, "unlike those cases where the federal government did not have a separate contract with the vendor, but attempted to obtain immunity based in part on its responsibilities under its internal contract with the contractor," here "the federal government has a direct contract with the vendor and the contractor does not" (Pet. App. A10-A11). The court noted that Olin's role as plant manager did not discharge the federal government from its obligation to KCPL for the purchase of electricity. Instead, it merely permitted "actions by another party, Olin, to satisfy the federal government's obligations" (*id.* at A12-A13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court, any other court of appeals or the Missouri Supreme Court. Further review is therefore not warranted.

1. "[A] State may not, consistent with the Supremacy Clause, Art. VI, cl. 2, lay a tax 'directly upon the United States.'" *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982), quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943). A tax falls directly upon the United States if the legal incidence of the tax falls on the federal government. *United States* v. *New Mexico*, 455 U.S. at 742. If the United States is the purchaser, and if the legal incidence of the state tax falls on the purchaser, the tax falls directly upon the United States and is prohibited by the Supremacy Clause.

Whether the legal incidence of a state tax falls on the United States is a federal question. *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347 (1968).[5] Under the decisions of this Court, when "a State requires that the sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 608 (1975). Accord, *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. at 347.

Properly applying these controlling decisions, the court of appeals correctly held that the legal inci-

---

[5] In making that determination, federal courts are not bound by decisions of state courts. *Diamond National Corp.* v. *State Bd. of Equalization*, 425 U.S. 268 (1975).

dence of the Missouri sales tax is upon the purchaser and therefore upon the United States in this case (Pet. App. A7-A9). The court recognized that Mo. Rev. Stat. § 144.020.1 levies a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property * * * at retail in this state" (Pet. App. A7). But the court correctly observed that other provisions of Missouri law reveal that this tax must be passed on to, and collected from, the purchaser. In particular, (i) Mo. Rev. Stat. § 144.080.4 (1996) requires the seller to collect the sales tax from the purchaser, (ii) Mo. Rev. Stat. § 144.060 (1996) makes it a misdemeanor for the purchaser to refuse to pay the tax and (iii) Mo. Rev. Stat. § 144.080.5 (1996) prohibits sellers from advertising or stating in public or to customers directly or indirectly that the sales tax "required to be collected by [the seller]" from the purchaser will be assumed by the seller. Under this Court's decisions, these requirements of Missouri law—that the vendor pass the tax on to, and collect it from, the purchaser—establish that the legal incidence of the tax is on the purchaser. See *United States* v. *Mississippi Tax Comm'n*, 421 U.S. at 608. Moreover, as this Court noted in *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. at 347-348, this conclusion is buttressed by the state prohibition against advertising by sellers that they would absorb the tax.

The court of appeals was not unmindful in this case that Missouri courts have held, for purposes of state law, that the legal incidence of the state tax falls on the seller (Pet. App. A8, citing, *e.g.*, *Farm & Home Savings Ass'n* v. *Spradling*, 538 S.W.2d 313, 316 (Mo. 1976)). As the court of appeals observed, "[t]he Missouri courts' construction of the sales tax may be

appropriate, for instance, when Missouri is attempting to collect the tax from noncompliant sellers" (Pet. App. A8). It is well established, however, that in evaluating the constitutional immunity of the United States from state taxation, federal courts are not bound by the State's characterization of its statutory scheme (note 5, *supra*). Instead, as this Court has held, when "the sales tax [is] passed on to the purchaser and [is to] be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States* v. *Mississippi Tax Comm'n*, 421 U.S. at 608.

2. Petitioners err in contending (Pet. 15-16) that the United States was not the purchaser of electricity under the contractual arrangement existing in this case. The United States entered the contract with KCPL in 1951 for the indefinite delivery of electricity to the Plant. That contract provides that KCPL will "sell and deliver" and that the federal government will "purchase and receive" electrical power for the operation of the Plant (Pet. App. A10). The contract makes the United States liable for the electricity delivered under that contract, including a minimum monthly charge (*ibid.*). Neither Remington nor Olin was ever a party to that contract.

As the court of appeals correctly determined (Pet. App. A10), Olin had no contract with KCPL. Instead, under Olin's contract with the federal government, Olin simply agreed to pay (and be reimbursed by the United States) for the electricity delivered under the government's contract with KCPL (*ibid.*).[6]

---

[6] As the court of appeals correctly concluded (Pet. App. A10 n.9), the correspondence that Olin sent to KCPL does not

3. Because the legal incidence of the Missouri sales tax falls upon the United States as purchaser, the court of appeals correctly concluded that the sale of electricity by KCPL to the United States was immune from the Missouri sales tax. See *United States* v. *New Mexico*, 455 U.S. at 742; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954)). Petitioners err in asserting (Pet. 16-20) that this holding conflicts with *United States* v. *New Mexico*, *supra*, *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941), *United States* v. *District of Columbia*, 669 F.2d 738 (D.C. Cir. 1981), and *United States* v. *Forst*, 442 F. Supp. 920 (W.D. Va. 1977), aff'd, 569 F.2d 811 (4th Cir. 1978).

In each of those cases, the contractors made the purchases in their own names and were directly liable under contracts that they had made with the sellers; the United States had no direct contract with the sellers in any of those cases. *United States* v. *New Mexico*, 455 U.S. at 743; *Alabama* v. *King & Boozer*, 314 U.S. at 11-12; *United States* v. *District of Columbia*, 669 F.2d at 739-740, 744; *United States* v. *Forst*, 442 F. Supp. at 922. In the present case, the situation is quite different—indeed, it is the opposite. In this case, the United States contracted with the seller for the delivery of electricity. The United States is directly liable under this contract for the electricity delivered. The electrical power was delivered to the government's substation at the ammunition plant. Only the credit of the United States is involved. Olin

---

represent a separate contract between Olin and KCPL. Instead, it informs KCPL that Olin will receive and pay the bills owed by the United States for the electricity delivered to the plant under the government's contract with KCPL.

did not contract for electricity to be supplied; nor did Olin extend its credit for the electricity that was delivered. Olin's only duty was to serve as the "paymaster" of the government in paying for the electricity that was delivered (Pet. App. A10).

The court of appeals correctly noted (Pet. App. A11-A12) that this case is similar to *United States* v. *Kabeiseman*, 970 F.2d 739 (10th Cir. 1992), in which the federal government ordered fuel for various facilities based upon information supplied to it by contractors. Title to the fuel passed directly from the vendors to the federal government. The contractors accepted delivery of the fuel, exercised substantial control over the use of the fuel and paid the bills directly to the vendor. Because the United States "placed the orders for diesel fuel, as well as taking title thereto, directly from the vendor" (*id.* at 743), the Tenth Circuit concluded that the United States, as purchaser of the fuel, was not subject to the Wyoming sales tax.[7]

---

[7] Petitioners contend (Pet. 13-14) that the definition of a "sale at retail" in Mo. Rev. Stat. § 144.010.1(8) (1996) indicates that Olin, not the United States, is the purchaser. That contention is not correct. That section of the statute defines a "sale at retail," which is subject to the sales tax, as "any transfer made by any person engaged in business * * * of ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." Petitioners assert that Olin must be regarded as the purchaser because Olin used the electricity (Pet. 13-14). But title to and control over the electricity passed directly to the United States at its substation under its contract with KCPL. Any right of Olin to use this electricity or any other property that the United States supplied came from Olin's contract with the United States.

The decision of the court of appeals represents the application of settled law to the facts of this case. Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID ENGLISH CARMACK
Attorney

MAY 1996